

### THE TREATY-MAKING POWER

Professor Myres S. McDougal led a discussion on the American Bar Association resolution relative to the proposed constitutional amendments to limit the treaty-making power. Mr. Lyman M. Tondel, Jr., Chairman of the Section of International and Comparative Law of the American Bar Association, was also present to express his views. A member of the American Bar Association Committee on "Peace and Law through United Nations" had been invited to defend the resolution, but was not present at the meeting. Professor McDougal expressed his extreme regret at this absence. Professor McDougal opened the discussion by reading the American Bar Association resolution and Senator Bricker's resolution. He considered these proposals under five heads:

I. The kind of foreign affairs power the United States needs in the contemporary world.

II. The kind of foreign affairs power we now have in the United States.

III. The conditions that produced the present structure of control over foreign affairs and the significance of such conditions for our contemporary national interests.

IV. The current criticisms of our foreign affairs powers and the assumptions upon which these criticisms are based.

V. The validity of the current criticisms when assessed against our contemporary need.

#### I. *The kind of foreign affairs power we need.*

In this world we are interdependent with all other peoples aspiring to be free for the most elemental security, and *a fortiori* for all the other values we cherish. The most intensive cooperation of all free peoples will be required to pre-

serve security and other democratic values. No nation in the world today has freedom of decision in fact. What Professor Lowenstein has said about the illusion of sovereignty is most relevant to our present inquiry. The one realistic question is how *effectively* we can participate in—not how successfully we can hide ourselves from—the transnational decisions which shape our future.

The kind of foreign affairs power we need to cope with the problems of contemporary world conditions may be determined by elaborating in detail such criteria as the following: democracy, efficiency (quickness, flexibility, rationality in respect to values), representativeness of national interest, responsibility to other nation-states, and maintenance of civilian supremacy.

## II. *The kind of foreign affairs power we have.*

Save for the veto of a minority third of the Senate over treaties, we have today a foreign affairs power which meets the criteria specified above. It is sufficiently comprehensive and flexible to secure national interests and to permit our assumption of leadership in the free world, but sufficiently limited to protect individual rights and discourage aggrandizement of official power. (An over-all summary and documentation appears in McDougal and Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action* 59 Yale L. J. 60, 90-106.)

By 165 years of constitutional development it has been determined that the treaty-making power extends to every matter of "genuine international concern". Yet the Supreme Court has many times asserted its willingness, if occasion ever requires, to review a treaty for its relation to international concern and for its compatibility with the express prohibitions of the Constitution.

The treaty-making power was intentionally left undefined in the Constitution, because, as Madison explained, no defini-

tion could anticipate all future national exigencies and it would be unwise to impose unnecessary restraint. Upon this, it is certainly appropriate for us to recall the wisdom of the forefathers. Contrast the attitude of contemporary spokesmen who profess to be afraid to leave decision to their successors.

From the beginning of our history, it has been established that agreements within the scope of the treaty power override all contrary state laws and policies. Within this domain, there are no rights reserved to the states. This was the decision of the Supreme Court on our very first treaty, the treaty of peace with Great Britain, and it has never been departed from.

Similarly, by Article VI(2), the exercise of the treaty-making power is made a "legislative act", establishing internal law for all decision-makers and private individuals. The collaboration of the President and two-thirds of the Senate are given effects equivalent to those obtainable by the whole Congress and a unified national policy is assured. History suggests that approval of two-thirds of the Senate is a legislative act no more easily secured than a majority vote of both Houses.

Whether an international agreement in fact becomes immediately internal law in the United States, binding upon all officials and individuals, depends upon the terms of the agreement, and upon what the United States has promised. If the United States promises that the agreement shall bind immediately, then by Article VI(2) it so binds. If, however, what the United States promises is that some further action will be taken by the Congress or other official body before internal obligation, there is nothing for Article VI(2) to make immediately binding. Nothing in the much mooted decision in the *Seii Fujii* interferes in the slightest with the power of the United States to protect itself against premature obligation by the express terms of its agreement. The phrases "self-executing" and "non-self-executing" are no more than lawyers' gobbledygook for ascertaining the intent of the parties when that intent is left obscure.

The whole Congress has wide powers, granted by the express terms of the Constitution and exercised in hundreds of instances since the beginning of our history, to frame policies to guide the President in his conduct of negotiations and to validate agreements negotiated by him as the law of the land. Contemporary constructions of the war and commerce and other powers offer indispensable protection against the minority third veto in the Senate. (See 250 pages of documentation in McDougal and Lans, *Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy*, 54 Yale L. J. 181, 534 (1945).)

As "the Executive" and as "the Commander-in-Chief of the Army and Navy", the President has very broad powers to make international agreements. These powers, like the treaty power, are wisely undefined in the Constitution and, also like the treaty power, may be expanded, without danger of tyranny, to meet any exigencies that the nation may confront.

The broad scope of the powers outlined above need cause no fear of official oppression or unnecessary invasion of private rights. They are subjected to certain severe limitations and are compensated by a balancing of powers in the government that will protect our liberties so long as we desire to protect them.

It is agreed by all competent authorities that international agreements are subject to judicial review not only for the genuineness of their international concern but also for their compliance with the Bill of Rights and other direct prohibitions of the Constitution. The much maligned decision in *Missouri v. Holland* offers nothing to the contrary. In fact Mr. Justice Holmes in his opinion expressly reserves such power. That case decided only that the flight of migratory birds was within the scope of the treaty power, even if one assumed a narrow interpretation, now rejected by the Supreme Court, of the commerce power of the Congress. The words of the Constitution and the consistent doctrine

and practice of the Supreme Court afford that court full opportunity to exercise judicial review over international agreements so long as it chooses to do so.

The foreign affairs power, in all its manifestations, is also balanced by the powers of the whole Congress.

The whole Congress can at any time by simple majority vote enact a statute repealing the internal effects of any international agreement. This is a power which has been exercised many times and sustained by the Supreme Court. An international agreement of consequence for present purposes must, furthermore, eventually require for its implementation the appropriation of funds from the whole Congress. By withholding funds, the Congress can make the agreement impotent as a tool of oppression.

So much misconception is abroad that it should perhaps be emphasized that the United States is more securely protected against international agreements than any other major nation, except Canada. It is the only major nation which requires a two-thirds vote of a legislative body for approval of treaties. It has further much greater protection in judicial review and the Bill of Rights than most nations have. Contrast, for example, the situation in Great Britain where there is no explicit judicial review, where the executive can make any agreement a binding international agreement, and where a simple majority vote of the legislature, which must stand for re-election if it does not support the executive, can make any agreement the law of the land. In his masterful address in the 1951 Proceedings of the American Society of International Law, Professor Lawrence Preuss has reviewed the agreement making procedures of the major nations and has demonstrated that, apart from its unique protections, the United States has very much the same procedures for the making and implementation of international agreements as the other nations. The continued charge by critics of the treaty-making power that the United States is peculiarly vulnerable must be ascribed to lack of information.

III. *The conditions that produced the present structure of our foreign affairs power.*

It was found under the Articles of Confederation that the central government would not even make and enforce peace so long as the individual states had a voice in foreign affairs. The principal purpose for calling the Constitutional Convention was to make this nation "one" so far as other nation-states were concerned. If this was necessary for a rural community of a few million people, scattered along the Atlantic seaboard in the world of that time, consider how much more imperative it is for our contemporary nation in the contemporary world.

Is it in fact true that there are in this country sectional interests in international affairs that in the long run differ from the interests of the whole nation? Any one section of the country is as much interested as any other in the preservation of our national independence from external encroachment or internal erosion. Mr. Lans and I wrote in summary:

" . . . when our security system breaks down, every section of the country is put to work, and men are drafted from every section of the country, to repair the breach. Any one section of the country is as much interested as any other in the maintenance of full production, employment, and consumption and in preventing world-wide economic depression, with its consequent impoverishment of our national standard of living. Even where some one section of the country is more interested than any other section in the price of a particular commodity, the price of that commodity is dependent upon all the factors which make up demand, and these factors in turn are ultimately dependent, if the commodity is of any importance, upon the whole economy of the nation. What can thus be shown of the interdependence of all our sections with respect to security and economic prosperity in the formulation and effects of foreign policy could equally well be shown with respect to all our other major interests. For

the long-run achievements of its total values in our international affairs, any one section of our country is wholly dependent upon a similar achievement by every other section."

Even if it be assumed that there are sectional interests deserving protection, the problem remains of identifying such interests. Mr. Lans and I summarize:

" . . . The first difficult question is whether all sectional interests or just some sectional interests are to be given this special protection. If all sectional interests, however short-run or however dangerous to the rest of the country, are to be protected, the result is complete disintegration of national policy. As Gouverneur Morris long ago warned the Constitutional Convention, there "can be no end of demands for security if every particular interest is to be entitled to it." If only some sectional interests are to be protected, the problem is to achieve a criterion of selection. The only defensible criterion, other than sheer power, is the public interest, which again comes back to the national interest. If the alternative of sheer power is adopted, what begins as mere protection of sectional interests is transmuted into determination of national policy without appropriate regard for the national interest. It is obvious that a negative decision on behalf of a single section may have the effect of precluding a positive policy on behalf of the whole nation; in most instances, we either join a particular international organization or enter into a particular agreement or we do not. Those proponents of a minority veto for sectional interests who have a real regard for the national interest are therefore confronted with an irremovable dilemma."

It is not supposed, as the critics of the treaty-making power assert, that the framers of the Constitution did not recognize this dilemma and make their decision. One of my

students, Mr. Richard I. M. Kelton, has made an investigation of the history of their deliberations, from which I would like to read to you.

The Bricker Resolution is the culmination of a series of proposals for constitutional change based on the assumption that in the drafting of the Constitution the creators did not envision the broad scope of authority given to the Federal Government by the Treaty Power. This viewpoint is clearly stated by Senator Bricker in his speech introducing the proposal before the Senate.

The joint resolution just introduced is designed to plug a growing loophole in the Constitution. . . . The menacing loophole we see in the Constitution today was simply not visible in 1787. . . . The founding fathers did not dream that the relationship of the American people to their Government could be altered by treaty.

(Note: Bricker, *Congressional Record—Senate*, volume 98, February 7, 1952 at pp. 921-22.)

Knowledge derived from their experience of the Treaty of Peace with Great Britain made the leaders of the Constitutional period aware that treaties could, and that it was necessary that treaties should, effectively alter the relationship of people in America to their government. Article 6 of the treaty provided that there was to be no further confiscation of property or persecution of persons for their part in the war. This section of the treaty gave both economic and political rights to people in America which State laws had denied. For example, South Carolina in laws of January 1782 banished some people, confiscated estates of others, and fined others 10-12% of their total estates for pardons. (Note: Jensen, *The New Nation*, 275-7 (1950).) Pennsylvania had "Test Acts" which "required that all the white male inhabitants must take an oath renouncing fidelity to George III, pledging allegiance to Pennsylvania, and agreeing to expose conspiracies. If they refused to take the oath, they could not hold office, vote, serve on juries, buy, sell or transfer real



estate, or sue for the collection of debts. Thousands of Pennsylvania residents refused to take the oath.” (Note: *Ibid.* at 272-4.) In addition New York had passed laws in 1784 which disenfranchised all who had been British officials, who had helped the British in any way during the war, who had left the state, or who had joined the British. (Note: *Ibid.* at 271-2.) All of these State laws purported to regulate the relation of people to their government, and the British Treaty was by its provisions intended to change the relationship the laws had established.

This practical lesson was not lost on the leadership of the period and the Constitution was drafted and ratified despite statements that clearly indicate recognition of the possibility that a treaty could have an impact on the people’s relationship with their government. . . .

In a second important area Senator Bricker is trying to revive an issue which had been thoroughly considered and rejected by the framers of the Constitution. He advocates making the House of Representatives pass along with a majority of the Senate an act or joint resolution before a treaty or executive agreement shall alter or abridge the laws of the United States or the laws or the Constitution of the States.

The history of the Convention shows that full consideration was given to the problem and the proposal was twice soundly defeated. A proposed amendment provided “The Senate shall have the power to treat with foreign nations, but no Treaty shall be binding on the United States which is not ratified by Law.” This amendment was defeated, one for, eight against, one divided. . . .

What was accomplished was fully recognized by both friends and opponents of the Constitution. In Federalist Paper number 64 Hamilton fully considered the treaty making process and defended it with words that should be heeded today.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern as the laws passed by our legislature. All constitutional actions of power, whether in the executive or in the judicial department, have as much legal validity as obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

In number 75 Hamilton dealt with the same problem again and his objections to including the House of Representatives in the Treaty Making process are fully explained.

The proposals of Senator Bricker are thus seen to be nothing more than a reconsideration of matters fully considered and decisively rejected by the far-sighted founders of the Constitution. If in their day they deemed it wise to keep the treaty power unencumbered, today, with the added complexities of the problems and the greater need for rapid action, a flexible treaty power is even more necessary and prudent.

#### *IV. The current criticisms of the foreign affairs power.*

The language of the Bricker Resolution and of the recommendation of the Peace Through Law Committee is obscure,

complicated, and contradictory but certain objectives seem to underlie both proposals. These may be itemized as:

- (1) the provision for individual citizens and our internal states of some new special protection from the agreement making power;
- (2) the putting of certain agreements wholly beyond the power of the federal government; and
- (3) the provision, by curtailing the powers of the President, that certain agreements can be made only in certain ways.

Let us review these objectives in detail in the same manner as in the recent report on the Bricker Resolution of the Committee on Federal Legislation and the Committee on International Law of the Association of the Bar of the City of New York. The appraisal of specific objectives we offer, parallels that to be found in that excellent report.

#### V. *The validity of the current criticisms.*

The current criticisms are based upon completely unrealistic assumptions and unreasoned fears. The amendments proposed are not only unnecessary but also threaten to make the United States a constitutional cripple among the other nation-states at the very moment when world leadership is required for national survival.

The one rational amendment to our national foreign affairs power would be the removal of the minority-third veto in the Senate and the adoption of a simple majority vote in both Houses as the procedure for authorizing and approving important agreements. It is but another of the tragic ironies of our time that we must today seriously debate proposals that approach the opposite extreme in minority rule and impotence in foreign policy.

Mr. Tondel opened the discussion on this question by remarking that he had submitted an article on the subject to a

monthly periodical which had rejected it because he was apparently "an internationalist"; and that another periodical had turned down a similar article because he was "not an internationalist". He felt that unfortunately many of the people who control the Press are today insistent that only their own points of view be expressed, even in matters of detail, and are unwilling to give space to those who disagree even in part.

He pointed out that the Section on International and Comparative Law of the American Bar Association has about 900 members compared with the seven who are on the American Bar Association Standing Committee on Peace and Law through United Nations. These seven are men of high reputation who firmly believe that their proposed constitutional amendment is sound. However, on the whole, they are not men with much experience in this field, as demonstrated by the fact that one member of the Committee had remarked in February that he had learned to his surprise that it was occasionally quite necessary for the President to have the power to make executive agreements. A great many lawyers, the speaker remarked, are thinking for the first time of these great problems, and we should take particular care to be patient while they are thinking them through.

This debate started in this way. The proposed Covenant on Human Rights, which is still in the draft stage, and the Genocide Convention would, as indicated by Professor McDougal, impinge on what the Peace and Law Committee members regard as domestic rights of States as distinguished from the proper subject matter for treaties. At first, up until two years ago, emphasis was placed on the power of the President and the Senate to protect domestic rights by working out reservations, to the Genocide Convention for example, which would keep it from being self-executing. The Section on International and Comparative Law of the American Bar Association painstakingly prepared proposed reservations in keeping with the spirit of the Genocide Con-

vention, and several of these were recommended by the Senate Foreign Relations Committee. However, the *Fujii* case in California implied that you could say almost nothing by way of reservation or in a treaty which would prevent it from being self-executing, and during the long period when the *Fujii* case was on appeal (it has now been unanimously reversed on this issue), the Committee on Peace and Law began insisting that a constitutional amendment to limit the treaty-making power was necessary.

When the Committee on Peace and Law tries to restrict Congress to its powers otherwise delegated, it is really insisting on the protection of States' rights. It says that the only protection against an improvident treaty that would take away the rights of the States is the wisdom of the president and the Senate, and that that is not enough. However, the word "treaty" means something, and if the President and the Senate were to make a "treaty" that did not involve the proper subject matter for a treaty, it would be up to the Supreme Court to determine whether it was a proper treaty. It has been repeated in at least nine Supreme Court decisions that the Constitution is supreme over the treaty power.

Another protection against abuse of the treaty power is that Congress may terminate the domestic effect of a treaty by a subsequent statute. Why have a constitutional amendment, the speaker asked, when Congress can already do by subsequent statute what the Committee on Peace and Law would give Congress power to do by constitutional amendment?

Mr. Tondel disagreed with Professor McDougal's statement as to the extent of the commerce power. He conceded that it is broader than it used to be and is growing, but he was not sure that the power to regulate doing business is, for example, within the commerce power. He felt that it would be unwise at this juncture in world affairs to try to restrict the treaty-making power of the Federal Government. If the

power to make treaties were limited to the powers otherwise delegated to Congress, many treaties of the ordinary sort, such as treaties of friendship, commerce and navigation, involving as they do the reciprocal right to own property, to do business, to inherit etc., would have to be approved by each of the States in order to be fully effective. What would the bargaining power of the United States be in making treaties under such conditions? The suggestion that any treaty should be implemented by an Act of Congress, in addition to being ratified by two-thirds of the Senators present, seems an unnecessary addition to the procedural requirements to ratify a treaty and make it fully effective. Mr. Tondel stated that it was his personal opinion that there is certainly no demonstrated need for a constitutional amendment, and that there should not be an amendment whether of the sort proposed by the Committee on Peace and Law through United Nations or by Senator Bricker.

President Eagleton thanked Professor Myres S. McDougal and Mr. Lyman M. Tondel, Jr. for participating in the debate.

### Evening Session

#### INTERNATIONAL LAW ASSOCIATION MEETING

The remarks of the speakers at the evening session are summarized as follows:

President Eagleton welcomed the members and guests and commented briefly upon the present status of international law. He referred to recent books by Morgenthau and Kennan which reject law, morals, and the United Nations as bases for American foreign policy and seem to suggest that a nation should build up its own strength and go its own ways. This is called "realism" though it leads to the same old anarchy and war. No state can guarantee to its citizens